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Goh Ming Han v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO M-05–36–02 OF 2014
MOHTARUDIN BAKI, ZAKARIA SAM AND ABDUL RAHMAN SEBLI JJCA
23 FEBRUARY 2015

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Criminal Law — Dangerous drugs — s 39B(1)(a) — Trafficking — Trafficking in 105.60g of methamphetamine — Appeal against conviction and sentence — Custody or control of drug at time of arrest — Whether trial court ought to have drawn inference in favour of accused at end of prosecution case — Whether trial court failed to conduct maximum evaluation of prosecution evidence — Whether trial court failed to sufficiently appreciate appellant's defence — Whether presumption of trafficking properly invoked — Whether conviction safe — Whether appellate interference warranted — Dangerous Drugs Act 1952 ss 12(2), 37(d) & 39B

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The appellant was charged for trafficking 105.60g of methamphetamine an offence under s 39B of the Dangerous Drugs Act 1952 ('the DDA'). SP8 and a police team arrived at the target house at the time and place specified in the charge. On their arrival at the target house, SP8 knocked the door several times and was opened by a female later identified as SP2. After gaining entry into the house, SP8 saw a Chinese male later identified as the appellant sitting on a mattress and leaning against the wall while SP3, the younger sister of SP2, was at the edge of the same mattress. A search was carried out on SP2, SP3 and the appellant but nothing incriminating was found on them. Then, according to SP8, the appellant went to the right side of the mattress, picked up an ice cream container from the floor and handed it to him. Inside the container were the drugs, the subject matter of the charge which the chemist confirmed to contain 105.60g of methamphetamine. The trial judge called the appellant to enter his defence. The appellant succeeded in rebutting the presumption of trafficking under s 37(da) of the DDA. At the conclusion of the defence case the appellant was acquitted and discharged of the trafficking charge. However, the trial judge found the appellant guilty of the offence under s 12(2) read with s 39A(2) and sentenced him to 17 years imprisonment and ten strokes of the *rotan*. In his appeal against conviction for the offence under s 12(2), the appellant advanced two grounds as follows; (i) that the learned trial judge failed to conduct a maximum evaluation of the evidence adduced by the prosecution; and (ii) that the learned trial judge failed to appreciate the defence of the appellant.

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Held, allowing the appeal, setting aside the appellant's conviction and sentence:

(1) Through the evidence of SP8 of the prosecution case, was that it was the appellant himself who handed to him the ice cream container containing the drugs. That, if true, would prove custody and control against the appellant, thereby activating the presumption of knowledge under s 37(d) of the DDA. But SP8's testimony was contradicted by two eye witnesses, namely SP2 and SP3 who testified that the ice cream container was recovered as a result of a police search, meaning to say it was not handed to SP8 by the appellant himself as claimed by SP8. The contradiction was serious and cuts deep into the prosecution case as it involves the crucial question of whether the drugs were in the appellants' custody or control at the time of the raid (see paras 8–9 & 14).

(2) In finding that it was the appellant who put the container near the mattress inside the room, it is clear that the trial judge relied heavily on the evidence of SP2, SP3, SP4 and SP6 who denied having anything to do with the drugs. The trial judge ought in the circumstances to have taken their evidence with some reservation or even with a pinch of salt as they were all suspects in the case and in fact arrested together with the appellant in the same house. SP8 himself admitted in cross-examination that the reason why he arrested everyone in the house was because he did not know who owned the drugs, and this was despite having told the court that it was the appellant who handed the drugs to him (see paras 17–18).

(3) In his testimony, SP8 did not say a word about the presence of any white plastic bag in the room. His evidence was that the appellant handed to him a red coloured ice cream plastic container which he said the appellant took from the right side of the mattress. There was not a shred of evidence to show that the red ice cream plastic container was taken from inside a white plastic bag, let alone from the same white plastic bag that SP2 said was brought into the room by the appellant. Further, there were two white plastic packets produced as evidence through SP8 and marked as 'A1' and 'A2' but no evidence was adduced to show any connection between these plastic packets and the white plastic bag referred to by SP2. All these were material facts and circumstances which the trial judge should have considered but failed to appreciate (see paras 22–24).

(4) It is trite jurisprudence that in a doubtful situation such as this the law leans in favour of the accused person. The prosecution's failure to explain the conflict in evidence meant that custody or control had not been proved in order to activate the presumption of knowledge under s 37(d) of the DDA. The unsatisfactory state of the evidence led by the prosecution did not make the conviction safe. While the appellant may have committed the offence but the strict requirement of proof does not

allow the court to bridge any gap in the prosecution's case. The benefit of the doubt must be given to the appellant. In fact, the defence should not have been called even for the lesser offence under s 12(2) of the DDA as no prima facie case had as a matter of law been established against the appellant (see paras 28–30).

[Bahasa Malaysia summary

Perayu dituduh kerana mengedar 105.60g methamphetamine satu kesalahan di bawah s 39B Akta Dadah Berbahaya 1952 ('ADB'). SP8 dan sepasukan polis tiba di rumah sasaran pada waktu dan tempat yang dinyatakan di dalam pertuduhan. Pada ketibaan mereka di rumah sasaran, SP8 mengetuk pintu beberapa kali dan telah dibuka oleh seorang wanita kemudian dikenal pasti sebagai SP2. Selepas dapat memasuki rumah SP8 melihat seorang lelaki berbangsa Cina kemudian dikenal pasti sebagai perayu duduk di atas tilam dan bersandar ke dinding manakala SP3, adik perempuan kepada SP2, berada di hujung tilam yang sama. Satu carian dibuat atas SP2, SP3 dan perayu tetapi tiada apa yang menyalahi undang-undang didapati pada mereka. Kemudian, menurut SP8, perayu pergi ke bahagian sebelah kanan tilam, mengambil satu bekas ais krim daripada lantai dan menyerahkan kepada SP8. Di dalam bekas adalah dadah, subjek perkara pertuduhan yang mana disahkan oleh ahli kima selepas analisis mengandungi 105.6g methamphetamine. Hakim perbicaraan memanggil perayu untuk memasukkan pembelaannya. Perayu berjaya mematahkan anggapan pengedaran di bawah s 37(da) ADB. Oleh itu, pesuruhjaya kehakiman yang bijaksana membuat kesimpulan kes pembelaan dilepaskan dan dibebaskan daripada pertuduhan pengedaran. Walau bagaimanapun, hakim perbicaraan mendapati perayu bersalah terhadap kesalahan di bawah s 12(2) dibaca bersama s 39A(2) dan menjatuhkan hukuman penjara 17 tahun terhadap perayu dan sepuluh sebatan rotan. Dalam rayuannya terhadap sabitan untuk kesalahan di bawah s 12(2), perayu mengemukakan dua sebab seperti berikut: (i) bahawa hakim perbicaraan gagal untuk melakukan penilaian maksimum terhadap keterangan yang dikemukakan oleh pendakwaan; dan (ii) hakim perbicaraan gagal untuk menilai pembelaan perayu.

Diputuskan, membenarkan rayuan, mengetepikan sabitan dan hukuman perayu:

(1) Melalui keterangan SP8 terhadap kes pendakwaan, bahawa adalah perayu sendiri yang telah menyerahkan bekas ais krim kepadanya yang mengandungi dadah. Itu, sekiranya benar, akan membuktikan kawalan dan jagaan terhadap perayu, dengan itu mengakifkan anggapan pengetahuan di bawah s 37(d) ADB. Tetapi testimoni SP8 dipertikaikan oleh dua saksi, iaitu SP2 dan SP3 yang memberi keterangan bahwa bekas ais krim didapati daripada carian polis, ini bermaksud ia tidak diserahkan kepada SP8 oleh perayu sebagaimana yang didakwa oleh SP8. Perbezaan

itu adalah serius dan menjejaskan kes pendakwaan kerana ia melibatkan soalan sama ada dadah berada dalam kawalan dan jagaan perayu pada masa serbuan (lihat perenggan 8–9 & 14). A

(2) Dalam dapatan bahawa ia adalah perayu yang meletakkan bekas berdekatan dengan tilam di dalam bilik, ia adalah jelas bahawa hakim perbicaraan sangat bergantung kepada keterangan SP2, SP3, SP4 dan SP6 yang menafikan mempunyai apa-apa kaitan dengan dadah. Hakim perbicaraan sepatutnya dalam keadaan itu mengambil keterangan mereka dengan beberapa syarat memandangkan mereka semua adalah suspek di dalam kes dan fakta bahawa mereka ditangkap bersama dengan perayu di dalam rumah yang sama. SP8 mengakui di dalam pemeriksaan balas bahawa sebab mengapa dia memberkas kesemua orang di dalam rumah itu adalah kerana dia tidak tahu siapa yang memiliki dadah itu, dan ini adalah di sebalik memberitahu mahkamah bahawa ia adalah perayu yang menyerahkan dadah itu kepadanya (lihat perenggan 17–18). B C D

(3) Dalam testimoninya, SP8 tidak menyatakan apa-apa perkataan tentang kehadiran apa-apa beg plastik putih di dalam bilik. Keterangannya adalah bahawa perayu yang menyerahkan bekas ais krim bewarna merah yang mana dia nyatakan diambil oleh perayu daripada bahagian kanan tilam. Tiada sebarang keterangan untuk menunjukkan bahawa bekas plastik ais krim berwarna merah diambil daripada beg plastik beg putih, apatah lagi daripada beg plastik putih yang sama yang dikatakan SP2 dibawa masuk ke dalam bilik oleh perayu. Selanjutnya, terdapat dua beg plastik putih dikemukakan sebagai keterangan oleh SP8 dan ditandakan sebagai 'A1' dan 'A2' tetapi tiada keterangan yang dikemukakan untuk menunjukkan apa-apa perkaitan antara paket plastik itu dan beg plastik putih yang dirujuk oleh SP2. Kesemuanya adalah fakta dan keadaan material yang mana sepatutnya dipertimbangkan oleh hakim perbicaraan tetapi gagal untuk menilainya (lihat perenggan 22–24). E F G

(4) Ia adalah perundangan nyata bahawa dalam situasi yang meragukan seperti ini, undang-undang condong berpihak kepada tertuduh. Kegagalan pihak pendakwaan untuk menerangkan konflik dalam keterangan bermakna bahawa jagaan atau kawalan tidak dibuktikan untuk mengaktifkan anggapan pengetahuan di bawah s 37(d) ABD. Keadaan keterangan oleh pihak pendakwaan yang tidak memuaskan tidak membuatkan sabitan selamat. Walaupun perayu mungkin telah melakukan kesalahan itu tetapi keperluan bukti yang tinggi tidak membenarkan mahkamah untuk memenuhi apa-apa ruang dalam kes pendakwaan. Manfaat keraguan hendaklah diberikan kepada perayu. Malahan, pembelaan tidak sepatutnya dipanggil walaupun untuk kesalahan yang kurang di bawah s 12(2) ADB kerana tiada kes prima facie dari segi perundangan telah dibuktikan terhadap perayu (lihat perenggan 28–30).] H I

Notes

For cases on s 39B(1)(a), see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 400–608.

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 37(d), 37(da), 39A(2), 39B(1)(a)

Appeal from: Trial No 45A-2–06 of 2012 (High Court, Melaka)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Nurshafini bt Mustapha (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Rahman Sebli JCA:

[1] The appellant was charged in the High Court at Melaka for drug trafficking and the charge against him is as follows:

> Bahawa kamu pada 26/1/2012 jam lebih kurang 3.30 petang di alamat B1, Pangsapuri Kesidang Sek 2, Jalan Kesidang 2/11, Taman Kesidang, Tengkera, di dalam Daerah Melaka Tengah, di dalam Negeri Melaka telah didapti mengedar dadah berbahaya iaitu 105.60 gram Methamphetamine. Oleh itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The salient facts. On 26 January 2012 Inspector Mohd Hisham bin A Rahman ('SP8') led a police party of 13 personnel including two anti-corruption officers to raid a house at the time and place specified in the charge. They were in civilian clothes. On their arrival at the target house at about 3.25pm the door was locked. SP8 knocked the door several times and after two minutes the door was opened by a female later identified as 'SP2'.

[3] After gaining entry into the house, SP8 together with SP2 and some other police personnel proceeded to the room located in the middle of the house. Inside the room SP8 saw a Chinese male later identified as the appellant sitting on a mattress and leaning against the wall while another female, a Malay ('SP3') was at the edge of the same mattress. This female is the younger sister of SP2.

[4] SP8 introduced himself as a police officer and at the same time instructed two of his personnel to carry out checks on SP2, SP3 and the appellant. Nothing incriminating was found on them. Then according to SP8 the appellant went to the right side of the mattress, picked up an ice cream container from the floor and handed it to him. Inside the container were the drugs, the subject matter of the charge which the chemist confirmed after

analysis to contain 105.60g of methamphetamine.

[5] Possession without lawful authority of 50g or more of this drug would trigger the presumption of trafficking under s 37(da) of the Dangerous Drugs Act 1952 ('the DDA'). On these facts the appellant was called upon to enter his defence. He elected to give sworn evidence.

[6] At the conclusion of the defence case the learned judicial commissioner acquitted and discharged the appellant of the trafficking charge as he found that the appellant succeeded in rebutting the presumption of trafficking under s 37(da) of the DDA. He however found the appellant guilty of the offence under s 12(2) read with s 39A(2) and sentenced him to 17 years imprisonment and ten strokes of the *rotan*.

[7] The public prosecutor did not file any appeal against the appellant's acquittal in respect of the trafficking charge but the appellant appealed against his conviction for the offence under s 12(2) and hence this appeal. Two grounds were advanced, as follows:

(a) that the learned trial judge failed to conduct a maximum evaluation of the evidence adduced by the prosecution; and

(b) that the learned trial judge failed to appreciate the defence of the appellant.

[8] Having considered the arguments of both sides carefully we unanimously allowed the appeal. We agreed with learned counsel for the appellant that the learned judicial commissioner failed to subject the prosecution's evidence to a maximum evaluation before calling for the defence. As alluded to earlier, the prosecution's case through the evidence of SP8 is that it was the appellant himself who handed to him the ice cream container containing the drugs. This if true would prove custody and control against the appellant, thereby activating the presumption of knowledge under s 37(d) of the DDA.

[9] But SP8's testimony was contradicted by two eye witnesses, namely SP2 and SP3 who testified that the ice cream container was recovered as a result of a police search, meaning to say it was not handed to SP8 by the appellant himself as claimed by SP8. According to SP3 the container was lying on the floor when it was found by the police. This is SP2's evidence in examination in chief:

J: Selepas itu polis tanya ada simpan apa-apa barang terlarang, saya jawab 'tak'. Semua jawab 'tidak ada'. Selepas itu, polis buat pemeriksaan dan saya diarahkan ke tepi sebelah adik saya di sebelah

A kiri, polis jumpa bekas aiskrim warna merah, dan tunjukkan barang sudah ada dalam bekas itu, dan polis tanya 'siapa punya'.

[10] SP3's evidence is as follows:

B J: Polis tanya ada simpan barang salah atau tidak. Saya cakap tidak ada. Lepas itu, dia check dalam kocek seluar saya. Tidak jumpa apa-apa. Lepas itu, polis geledah dalam bilik.

S: Selepas itu apa yang berlaku?

C J: Masa polis periksa, polis menjumpai tupperware mangkuk aiskrim warna merah.

S: Diambil dari mana?

J: Itu dalam bilik atas lantai.

D **[11]** Despite this glaring contradiction in the testimonies of SP2 and SP3 on the one hand and SP8 on the other, the learned judicial commissioner found all three of them to be truthful witnesses when he said 'Saya mempercayai SP2 dan SP3' and later 'Saya juga mendapati tidak ada alasan untuk saya untuk tidak mempercayai keterangan SP8 ...' (p 24 of the judgment).

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[12] With due respect to the learned judicial commissioner, he was not at liberty to accept both versions to be credible when the two versions were irreconcilable and in total conflict with one another. Either he believed SP2 and SP3 or he believed SP8 or he disbelieved all three of them. The learned judicial commissioner went into further error when he said that the evidence of SP2 and SP3 corroborated the evidence of SP8.

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[13] The contradiction gives rise to the question; what did the prosecution prove at the close of its case in relation to custody or control of the container that contained the drugs? Was the container lying on the floor and picked up by the police or was it picked up by the appellant and handed to SP8? This fact was never established one way or the other as the learned judicial commissioner did not make a finding either way.

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[14] The contradiction is serious and cuts deep into the prosecution case as it involves the crucial question of whether the drugs were in the appellants' custody or control at the time of the raid. It is trite law that where there is a doubt on any essential element of the charge the doubt must be resolved in favour of the accused especially where as in this case the doubt arose from the prosecution's own evidence.

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[15] The learned judicial commissioner however dismissed the contradiction as a minor discrepancy and concluded that the drugs were

brought into the room by the appellant who placed it next to the mattress near the door. It was of course for the learned judicial commissioner to make such finding of fact but before doing so he had a duty to evaluate the entire evidence and the probabilities of the case.

[16] The rule that the prosecution's evidence must be subjected to a maximum evaluation at the close of its case requires that the trial court directs its mind properly and adequately to every material aspect of the evidence both for and against the prosecution in order to determine whether the strict requirement of proof has been met by the prosecution.

[17] In finding that it was the appellant who put the container near the mattress inside the room, it is clear that the learned judicial commissioner relied heavily on the evidence of SP2, SP3, SP4 and SP6 who denied having anything to do with the drugs. The evidence of SP2 was particularly damaging to the appellant as her testimony was that it was the appellant who brought the white plastic bag into the room where the drugs were found.

[18] With due respect to the learned judicial commissioner although the credibility and the trustworthiness of any witness is a matter that is entirely for him to decide, he ought in the circumstances to have taken their evidence with some reservation or even with a pinch of salt as they were all suspects in the case and in fact arrested together with the appellant in the same house. SP8 himself admitted in cross-examination that the reason why he arrested everyone in the house was because he did not know who owned the drugs, and this was despite having told the court that it was the appellant who handed the drugs to him.

[19] It is also a fact that the room where the drugs were found had been rented and occupied by SP2 for about one month prior to the raid and there is no dispute that the appellant was a mere visitor on the date of his arrest. According to SP3, her sister (SP2) and the appellant were friends. SP4's testimony on the other hand is that SP2 was the appellant's girlfriend.

[20] The learned judicial commissioner may be right in holding the view that these witnesses had no motive to fix up the appellant but for obvious reasons they would have every reason to deny any connection with the drugs, more so when the case involved the death penalty.

[21] Further, the prosecution's evidence on the identity of the stuff that the appellant allegedly brought into the house is not free from doubt either. According to SP2 when she and the appellant arrived at the house the appellant brought in a white plastic bag and placed it on the floor to the right of the room door. Obviously the purpose of adducing this evidence was to show that the plastic bag that the appellant carried contained the drugs although SP2 claimed

that she did not see what was inside the bag.

[22] But SP8 in his testimony did not say a word about the presence of any white plastic bag in the room. His evidence is that the appellant handed to him a red coloured ice cream plastic container which he said the appellant took from the right side of the mattress. There is not a shred of evidence to show that the red ice cream plastic container was taken from inside a white plastic bag, let alone from the same white plastic bag that SP2 said was brought into the room by the appellant.

[23] There were two white plastic packets produced as evidence through SP8 and marked as 'A1' and 'A2' but no evidence was adduced to show any connection between these plastic packets and the white plastic bag referred to by SP2. In fact SP8's evidence at p 171 of the appeal record shows that 'A1' and 'A2' were found inside the ice cream container, which were actually the plastic packets that contained the drugs. Clearly neither could be the white plastic bag used to carry the ice cream container, if at all there was such a white plastic bag.

[24] All these in our view are material facts and circumstances which the learned judicial commissioner should have considered but failed to appreciate. Had he done so he would have found that a real doubt had been cast in the prosecution's case as to whether it was the appellant who brought the ice cream container into the room, bearing in mind there were four other persons in the house and a bottle which had been modified for smoking syabu was also found in the house.

[25] It is important to bear in mind that at the time the police entered the room where the drugs were found, the appellant was not in physical possession of the container, and neither were the other occupants of the house. In fact SP3 who was at the edge of the mattress in the same room was as proximate to the container as was the appellant. So too was SP2 who was the occupier of the room. Under these circumstances it is impossible to say with certainty that it was the appellant and not the others who had actual custody or control of the drugs.

[26] The fact that the appellant tried to bribe the police, even if true does not change the fact that the prosecution's evidence on a crucial aspect of the case, ie custody or control was not on firm footing. The bribery attempt would be potent evidence against the appellant if only he had been caught with physical possession of the drugs or had admitted to ownership of the drugs. Otherwise there are other inferences capable of being drawn from his act of attempting to bribe the police.

[27] What is clear in this case is that there were two conflicting sets of fact

laid out before the court over the issue of custody or control, one favourable to the appellant and the other unfavourable to him. The evidence that is favourable to the appellant is the evidence of SP2 and SP3 that the container containing the drugs was lying on the floor, thus negating custody and control on the part of the appellant. The evidence that is unfavourable to the appellant is the evidence of SP8 which shows otherwise.

[28] In this kind of situation the evidence that is favourable to the appellant must be taken to be the truth unless for good reasons the learned judicial commissioner had accepted the other contradictory evidence to be the truth, which unfortunately he did not when he accepted both versions to be true. It is trite jurisprudence that in a doubtful situation such as this the law leans in favour of the accused person. The prosecution's failure to explain the conflict in evidence means that custody or control had not been proved in order to activate the presumption of knowledge under s 37(d) of the DDA.

[29] In view of the unsatisfactory state of the evidence led by the prosecution we did not feel that the conviction was safe. We may be convinced ourselves that the appellant committed the offence but the strict requirement of proof does not allow us to bridge any gap in the prosecution's case. The benefit of the doubt must be given to the appellant.

[30] In our view the defence should not have been called even for the lesser offence under s 12(2) of the DDA as no prima facie case had as a matter of law been established against the appellant. As for the second ground of appeal we do not find any necessity to deal with it as we are with the appellant on the first ground.

[31] It was for reasons stated above that we allowed the appellant's appeal, set aside the conviction and sentence and ordered him to be acquitted and discharged.

Appeal allowed; appellant's conviction and sentence set aside.

Reported by Ashgar Ali Ali Mohamed